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November 8, 2010

Water Docket
Environmental Protection Agency
Mailcode: 28221T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Docket ID No. EPA-R03-OW-2010-0736
Comments on Draft Chesapeake Bay TMDL for Nutrients and Sediment

To Whom It May Concern:

The Virginia Farm Bureau Federation ("VA Farm Bureau") appreciates the opportunity to provide these comments on the Draft Chesapeake Bay Total Maximum Daily Load ("TMDL") for Nutrients and Sediment made available for public review by EPA on September 24, 2010. The VA Farm Bureau represents members that own and operate facilities in Virginia that produce row crops, livestock and poultry. Our members provide safe and affordable food, fiber and fuel to Virginians and Americans all across the United States through facilities and operations that (1) are subject to individual and/or general permits for the discharge of pollutants into water; (2) are participants in nutrient management programs supported by the Virginia Department of Conservation and Recreation; (3) undertake voluntary action to control the runoff of nutrients and sediments without participating in or reporting to a Virginia or federal program; and/or (4) are subject to the Agricultural Stewardship Program administered by the Virginia Department of Agriculture and Consumer Services.

The VA Farm Bureau has been a willing participant and partner in the Bay restoration efforts. Given the long history of the program and progress made to date, we are concerned that EPA is now trying to change the process without adequate opportunity for the public -- particularly those impacted by EPA's proposal -- to review, comment and understand the scope, nature, need and rationale for EPA's action. EPA has only allowed a 45 day comment period on the draft TMDL, which would materially disrupt Virginia's approach to water quality restoration with costly and unnecessary consequences for the agricultural community. Moreover, the process established by EPA allows Virginia less than 3 weeks to review and address the comments it receives before submitting a revised WIP to EPA. Such an accelerated schedule is unfair, particularly because the full record of EPA's decision-making has not been provided to the public for review and because EPA has conceded errors in the model that will not be addressed until after the public comment period closes.

The VA Farm Bureau has significant concerns about the legal basis for EPA's proposed TMDL, as well as its profound cost and impact on the agricultural community. Specifically:

- EPA does not have the legal authority to approve, disapprove or unilaterally change Virginia's WIP.
- Even if EPA did have that authority, there is no evidence in the record to support its rejection of Virginia's WIP, especially the WIP provisions that relate to agriculture.
- Allocations to Virginia's agricultural sources, both point and non-point, cannot be met without a commitment of funding for agricultural BMPs and technical assistance.
- Virginia's Agricultural Stewardship Program already provides a sufficient backstop for achieving agricultural reductions.
- A trading program presents a sensible, cost-effective approach to achieving reductions and enables the agricultural community to serve as a much needed relief valve for sources that cannot achieve assigned reductions.

The September 3, 2010 Virginia WIP reflects a solution that was developed through a lengthy collaborative process, and that ensures Bay restoration in a sensible, cost-effective and timely manner. The VA Farm Bureau supports Virginia's original WIP submission.

I. The Virginia WIP Appropriately Builds Upon the Significant Reductions Achieved to Date by Agribusiness and Other Stakeholders to Achieve Bay Water Quality Goals.

The VA Farm Bureau's members (farmers, foresters, etc.) are committed to environmental stewardship. Clean water and good soil are fundamental to our success. We have been doing our part, and will continue to do so in order to help create a healthy Chesapeake Bay and local waters.

As a result of this commitment, agriculture has met 52% of the reduction goals established in Virginia's Tributary Strategies for Nitrogen and 50% for Phosphorus and Sediment—all through a voluntary, incentive based program in Virginia. According to the Virginia Department of Forestry, 83% of logging jobs already use the proper combination of best management practices.

Virginia's Chesapeake Bay program has provided the impetus for VA Farm Bureau members to implement measures to address nitrogen, phosphorus and sediment discharges. Virginia's agricultural community has responded to these incentives.

- Virginia has put over $80 million into Agricultural Best Management Practice (Ag BMP) Cost-Share program since 2006. Farmers have matched this spending with $0.60 of every dollar, and are lined up at the

door to do more. Every year, there are more farmers interested in participating than there are funds to be distributed.

- Even without cost-share funding, agriculture is taking action. Virginia farmers fence cattle from streams, practice conservation tillage, test soils before applying fertilizer, and install buffers along waterways -- without federal or state funds -- and without being "counted" by EPA.
- Virginia has enacted the most far-reaching "bad actor" statute in the watershed to address agricultural contamination. Its "Agricultural Stewardship Act" was enacted in 1996 and became fully effective in 1997. *See* Va. Code §§ 3.2-400 *et seq*. Between April 1, 2009 and March 31, 2010, 100 inquiries were made through this program, resulting in 51 investigations and 21 cases that prompted needed improvements in agricultural operations.

The cooperative program that Virginia has established is working. Progress is being made. EPA's intervention at this point in the process will only cause friction, finger-pointing and litigation. Instead of progress we will have gridlock.

II. There is an Important Role for Agriculture in the Trading Program Included in Virginia's WIP.

Virginia's WIP recognizes the costs and operational impacts of achieving the necessary nutrient and sediment reductions. Accordingly, Virginia has structured a WIP that allows flexibility in how those reductions are achieved by including a comprehensive trading program.

EPA's proposed TMDL leaves no opportunity for trading or other creative, cost-effective solutions. By ratcheting down on all sectors unilaterally, there are no relief valves to encourage collaboration in achieving the Bay restoration goals. Due to the fact that neither EPA nor Virginia have regulatory authority over agricultural sources, the agricultural community has traditionally served as that relief valve, offering to partner with point sources and participate in innovative programs to make significant reductions. EPA's proposal eliminates those opportunities.

The agricultural community has a meaningful and important role to play in the trading process. Agricultural operations provide a lower-cost means of achieving nutrient and sediment reductions. Through trading, a farmer would be compensated for voluntarily reducing nutrient and sediment discharges from his/her farm. The baseline for establishing credits for agricultural operations should be set, as Virginia proposed, based on conservation plans established at the farm level. Farms can then determine additional voluntary projects to achieve greater reductions and generate credits.

The VA Farm Bureau encourages EPA to support Virginia's trading program. The trading program included in Virginia's WIP creates a strong framework for targeted reductions that encourage trading. EPA's proposed TMDL removes much of the incentives necessary for a successful trading program.

III. EPA Does Not Have the Legal Authority to Impose the Backstops in Its Proposed TMDL.

A. EPA Does Not Have the Authority to Require Implementation Plans, Much Less Impose Stringent Backstop Allocations as a Consequence of Alleged Deficiencies in State Implementation Plans.

1. Section 303 of the Clean Water Act Does Not Give EPA TMDL Implementation Authority.

Section 303(d) of the CWA requires states to establish TMDLs for pollutants contributing to water quality impairment at levels that will allow the waters to meet applicable water quality standards. 33 U.S.C. § 1313(d). If a state fails to perform this action, EPA has no enforcement authority against the state.[1] Instead, in the absence of state action, EPA may act directly.[2] This means that, under section 303(d) of the CWA, EPA is authorized to establish TMDLs if a state fails to act. No additional authority is conferred on EPA when it establishes a TMDL. In particular, EPA is given no implementation authority beyond that which it has under other provisions of the CWA.

Under current law, a TMDL is the sum of the wasteload and load allocations that allow a body of water to meet water quality standards. 40 C.F.R. § 130.2(i). Implementation plans are not part of the TMDL and are not subject to EPA approval. Section 303(d)(2) of the CWA requires states to incorporate approved TMDLs into the water quality management plans that the states maintain under section 303(e). This framework is carried through in EPA's existing TMDL regulations as well as its 1997 guidance document on TMDL implementation. *See* 40 C.F.R. § 130.7(a) and "New Policies for Establishing and Implementing Total Maximum Daily Loads" (1997) (noting that "Section 303(d) does not establish any new implementation authorities beyond those that exist elsewhere in State, local, Tribal, or Federal law.").

While EPA's 1997 Guidance does recommend that states submit implementation plans to EPA for review and comment, it does not purport to make implementation plans subject to EPA approval. *See also* EPA's Overview of Impaired Waters and Total

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[1] Congress may not establish a federal law that compels a state to take regulatory action. *See New York v. United States,* 505 U.S. 144, 162 (1992). ("While Congress has substantial power to govern the Nation directly,...the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instruction.").

[2] *Scott v. City of Hammond,* 741 F.2d 992, 996 (7th Cir. 1984), *cert. denied,* 469 U.S. 1196 (1985) ("[S]tate inaction amounting to a refusal to act" would be interpreted as a constructive submission of no TMDL, thus triggering EPA's duty to approve or disapprove such submission and to establish the TMDL itself (in the event of a disapproval)).

Maximum Daily Loads Program (***"Section 303(d) of the CWA does not specifically require implementation plans for TMDLs."***), accessible at http://www.epa.gov/OWOW/TMDL/intro.html; EPA's decision rationale for approving the Tidal Potomac PCB TMDL established by the Interstate Commission on the Potomac River Basin, dated October 31, 2007, at p. 12 (***"Neither the Clean Water Act nor the EPA implementing regulations, guidance or policy requires a TMDL to include an implementation plan. EPA therefore does not approve or disapprove implementation plans as part of the TMDL process."***) (emphasis added).

In 2000, EPA issued regulations that, among other things, would have required each TMDL to include an implementation plan. 65 *Fed. Reg.* 43586 (July 13, 2000). Congress blocked implementation of those regulations, and eventually EPA withdrew them. *See* P.L. 106-246 and 68 *Fed. Reg.* 13607 (Mar. 19, 2003).

As EPA acknowledges, the entire "accountability framework" EPA keeps referencing "is not itself an *approvable* part of the TMDL." Draft TMDL at page 7-4 (emphasis in original). Thus, neither section 303(d) of the CWA, EPA's regulations or guidance give EPA authority to approve, disapprove, or change Virginia's WIP.

2. Section 117 of the Clean Water Act Does Not Give EPA TMDL Implementation Authority.

EPA implies that section 117(g) of the Clean Water Act provides it with the regulatory authority to approve Virginia's WIP. *See* Draft TMDL, at 1-12 ("The accountability framework is also being established pursuant to CWA section 117(g)(1)."). Specifically, EPA is relying on language in section 117(g) that states that "the Administrator, in coordination with other members of the Chesapeake Executive Council, shall ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement...."

However, in enacting 117(g) in the "Chesapeake Bay Restoration Act of 2000" (enacted as Title II of the Estuaries and Clean Waters Act of 2000 (P.L. 106-457)), Congress did ***not*** provide the federal government with regulatory authority to achieve the goals listed in section 117(g). The Estuaries and Clean Waters Act of 2000 merges ten water quality bills that had each passed the House of Representatives as stand-alone bills with one bill that passed the Senate. The stand-alone version of Title II was H.R. 3039.[3] Therefore, the following language from the committee report for H.R. 3039 provides legislative history for section 117(g):

> "(g) Chesapeake Bay Program.—
> (1) Management Strategies.—Directs EPA, in coordination with other members of the Council, to ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve the goals of that Agreement. The Committee

[3] *See* Cong. Rec. H7490 (daily ed. Sept. 12, 2000).

expects EPA to meet the requirements of this paragraph through the award of implementation grants under subsection (e). ***Nothing in the Chesapeake Bay Restoration Act provides EPA with any additional regulatory authorities."***

H.R. Rept. No. 550, 106th Cong., 2d Sess., at 3 (2000) (emphasis added).

Thus, section 117(g) of the Clean Water Act does not give EPA authority to approve, disapprove, or change the state WIPs.

3. An Executive Order does not grant EPA authority to approve state WIPs.

EPA also cites Executive Order 13508 as authority to dictate the terms of state WIPs. "In addition, Executive Order 13508 directs EPA and other federal agencies to build a new accountability framework that guides local, state, and federal water quality restoration efforts." Draft TMDL, at 1-12. It would be a violation of Separation of Powers for the President to grant the Executive Branch any authority through an Executive Order or otherwise. Other than a few powers granted directly by the Constitution (and not at issue here) the Executive Branch can only implement the laws that Congress has passed. It cannot create any new authority.

Thus, Executive Order 13508 does not give EPA authority to approve, disapprove, or change the state WIPs.

B. EPA's Proposed TMDL Exceeds Its Authority Under the Clean Water Act and United States Constitution.

1. EPA Lacks Authority to Compel a Schedule for Implementation of the TMDL or to Threaten Consequences Against States that Fail to Meet this Schedule.

EPA has unilaterally established a schedule for achieving 60% of the reductions set forth in the Bay TMDL by 2017, and 100% of the reductions by 2025. *See* Bay TMDL Executive Summary at 1. To meet this schedule, EPA has mandated that the states meet recurring two-year milestones to demonstrate their restoration progress or suffer certain EPA-prescribed consequences. Bay TMDL at page 1-12 ("The Bay TMDL will be implemented using an accountability framework that includes WIPs, 2-year milestones, EPA's tracking and assessment of restoration progress and, as necessary, specific federal actions if the Bay jurisdictions do not meet their commitments.").

The problem with EPA's schedule and mandate is that EPA has no authority to compel them. Nothing in the Clean Water Act or EPA's implementing regulations provides a deadline for TMDL implementation. To the contrary, TMDLs are simply planning tools that help to inform state water quality management decisions. EPA has

conceded as much in prior TMDL litigation. *See, e.g., Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002).

2. EPA Cannot Require States to Undertake Specific Implementation Measures.

EPA's only authority under the TMDL program is to allocate loads and wasteloads to nonpoint and point sources. It does not have the authority to require states to adopt new regulatory provisions under the guise of "assumptions" used to prepare the load allocations in the TMDL. But EPA's proposed TMDL goes much further.

EPA states that, under 40 CFR § 122.44(d)(1)(vii)(B), water quality based effluent limitations in permits must be "consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 C.F.R. § 130.7."[4] In section 8 of the Draft TMDL, EPA says: "This section summarizes the assumptions that are incorporated into the Chesapeake Bay TMDL allocations in a TMDL." EPA then attempts to incorporate implementation measures into the TMDL itself. For example, EPA assumes that watershed jurisdictions will issue new regulations that will regulate every animal feeding operation, regardless of the number of animals and regardless of whether or not the facility discharges:

> As with stormwater point sources, in its backstop allocations EPA has included currently unregulated AFOs in the WLA portion of the TMDL. For such sources, ***EPA's draft backstop allocation is based on two assumptions:*** (1) currently unregulated sources will become regulated under the NPDES permit program some day through appropriate designation/ rulemaking/ permits; and (2) the projected sector wasteload reductions (based on NPDES effluent controls consistent with the WLA) will result in those needed reductions.

Draft TMDL, at 8-11 (emphasis added).

Nothing in the CWA or EPA regulations gives EPA the authority to use EPA's permitting regulations to compel state regulatory action. In fact, such authority would violate the 10th Amendment to the U.S. Constitution. In *New York v. United States,* 505 U.S. 144 (1992), the Supreme Court struck down a provision of federal law that required States to provide for the disposal of radioactive wastes. The Court held that Congress may not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. *Id.* at 161. In other words: "While Congress has substantial power to govern the Nation directly,...the Constitution has

[4] Of course, the Chesapeake Bay TMDL will not be approved by EPA pursuant to 40 C.F.R. § 130.7 because this TMDL is not being developed by states. Thus, it is uncertain what legal effect this regulation will have with respect to permits for point sources in the Chesapeake Bay watershed. Arguably, it has no effect.

never been understood to confer upon Congress the ability to require the States to govern according to Congress' instruction." *Id.* at 162. Accordingly, the Clean Water Act and 40 C.F.R. 122.44(d)(1)(vii)(B) cannot be read to give EPA authority to make "assumptions" that a state will enact and enforce a regulatory program, and then try to enforce that "assumption" through the CWA permitting program.

C. EPA Cannot Demand Development of an Implementation Plan Before a TMDL is Established.

Through this process, EPA has demanded that Virginia develop its WIP even before a final TMDL has been established. This does not make any sense. The TMDL process is designed to establish the necessary allocations between various sources. The implementation planning process then determines the actions - both regulatory and non-regulatory - needed to achieve those allocations. EPA's requirement that Virginia develop its WIP even before the TMDL has been established is backwards and undermines the adaptive management framework envisioned by Virginia and the regulatory framework.

EPA has signaled its support for adaptive management in the TMDL process, especially with respect to future course corrections in EPA's new "accountability" framework. However, EPA has not gone far enough tot embed adaptive management principles into the TMDL allocations, assumptions or requirements for the Bay. Given the size and complexity of this TMDL, it is vital that EPA acknowledge the inherent limitations in its ability to predict with confident the reductions that are needed to restore the Bay or the effect of EPA's proposed reductions on the Bay restoration goals.

Rather than fight over issues of precision now - a fight that tends to polarize positions and divide stakeholders who otherwise might agree to work together in a cooperative manner - EPA should take a phased and adaptive approach, first identifying the immediate, near-term reductions for which Virginia has already established a regulatory framework and for which there is general consensus, and then project future phases based on additional data collection and modeling refinements. The process EPA is requiring here is not a step-wise approach, but rather an amalgam of steps (TMDL development and implementation plan together) that will only lead to controversy and confusion.

D. EPA's Threats of Consequences Overstate EPA's Authority.

In the Draft TMDL, EPA expressly states that unless states "[d]evelop and submit Phase I, II, and III WIPs consistent with the expectations and schedule described in EPA's letter of November 4, 2009, and the amended schedule described in EPA's letter of June 11, 2010," EPA will take one or more punitive actions that were outlined in a December 29, 2010, letter to watershed jurisdictions. Draft TMDL, at 7-11. This remarkably heavy-handed statement is a complete departure from the cooperative federalism that is the hallmark of the CWA. Under the CWA, authorized states such as Virginia carry out CWA programs in that state. EPA does not dictate the terms of how

water quality standards are to be met. If EPA believes that a state is not administering the CWA permitting program properly, EPA may withdraw approval of the state program. 33 U.S.C. § 1342(c)(3). EPA has some authorities, short of program withdrawal. However, these authorities address specific fact patterns, not EPA displeasure with a state WIP. Moreover, those consequences must be related to achievement of the water quality goals. Here, EPA cannot demonstrate that the partial and full backstop allocations it is threatening to impose are necessary for the water quality standards to be attained.

E. EPA Cannot Use the TMDL Process to Create a Permitting Program for Unregulated Sources.

If EPA does not agree with a state WIP, EPA claims the authority to use residual designation authority to regulate unregulated sources in that state. As noted above, one of the assumptions EPA is making in its backstop allocations is that all animal feeding operations are regulated sources. Presumably, EPA intends to impose this assumption on Virginia by designating animal feeding operations (AFOs) as regulated concentrated animal feeding operations (CAFOs).

EPA's authority to designate AFOs as CAFOs is governed by 40 C.F.R. § 122.23(c). However, that authority is limited. First, the AFO must actually discharge pollutants.[5] Second, either the state or the EPA Regional Administrator must make a determination that the particular AFO "is a significant contributor of pollutants to waters of the United States." Third, if a state is authorized to carry out the CWA permitting program (which includes every watershed jurisdiction except for the District of Columbia) then the Regional Administrator may designate an AFO as a CAFO ***only if*** "the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment of a downstream or adjacent State or Indian Country water that is impaired for that pollutant." 40 C.F.R § 122.23(c)(1). EPA will not be able to rely on its Chesapeake Bay Watershed model to make these determinations, because the model cannot predict water quality impacts at the individual facility level. Thus, EPA will have to develop site-specific data before it can make such a determination.

Notably absent from the regulation is the authority to designate an AFO as a CAFO because EPA does not like a state's WIP. Accordingly, EPA does not have the legal authority, must less the technical support, for its residual designation authority against AFOs (in both its backstop allocation and in its evaluation of the Virginia's WIP).

IV. Even if EPA Had Approval Authority over Implementation Plans, the Reasonable Assurance Standard Has Not Been Defined or Promulgated by EPA and Thus Cannot be Used as a Basis to Impose Backstop Allocations.

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[5] *See Waterkeeper Alliance et al. v. EPA,* 399 F.3d 486, 504 (2d Cir. 2005); *Service Oil, Inc v. EPA*, 590 F.3d 545 (8th Cir. 2009).

EPA asserts that one of its primary concerns about the Virginia WIP is lack of "reasonable assurance." "Reasonable assurance" is a concept that does not exist in either the CWA or EPA regulations. EPA created this concept in its 1997 TMDL guidance. Under that guidance, EPA states that TMDLs should provide "reasonable assurances" that load allocations will be met if relied upon to establish point source wasteload allocations, and encourages submission of implementation plans to EPA. But the 1997 Guidance does not define reasonable assurance, nor does it give EPA authority to require reasonable assurance.[6]

The "reasonable assurance" concept cannot be used as the primary basis for rejecting Virginia's WIP because it has not been adequately defined. EPA has never explained how much reasonable assurance is enough, or, alternatively, how much assurance is reasonable. *See, e.g.,* Enclosure A of EPA Region III Letter to Maryland Secretary of the Department of Natural Resources, September 11, 2008, "Neither the Clean Water Act nor EPA's regulations provide a definition of 'reasonable assurance.'" Absent such an explanation, Virginia has no guideposts by which to measure its nonpoint source reduction strategies.

Recognizing the need for a clear answer to these "how much is enough" questions, EPA added a definition of reasonable assurance to its TMDL rule revisions in July 2000. Under that definition, reasonable assurance of nonpoint source reductions hinged on a test that focused, among other factors, on whether the proposed control actions would be "implemented as expeditiously as practicable" and "accomplished through reliable and effective delivery mechanisms."[7]

After more than four years in the making, EPA's 2000 definition of "reasonable assurance" never took effect. Before the final rule was even published in the *Federal Register*, Congress used a spending prohibition to bar EPA from implementing it due to significant concerns about many aspects of the rule. Subsequent lawsuits, review by the National Research Council, and further deliberations by the Agency eventually led to withdrawal of the rule in 2003.

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[6] "New Policies for Establishing and Implementing Total Maximum Daily Loads" (1997) (noting that "Section 303(d) does not establish any new implementation authorities beyond those that exist elsewhere in State, local, Tribal, or Federal law").

[7] "For nonpoint sources ... the demonstration of reasonable assurance must show that management measures or other control actions to implement the load allocations contained in each TMDL meet the following four-part test: they specifically apply to the pollutant(s) and the water body for which the TMDL is being established; they will be implemented as expeditiously as practicable; they will be accomplished through reliable and effective delivery mechanisms; and they will be supported by adequate water quality funding." 65 Fed. Reg. 43,586, 43,663 (July 13, 2000) (to be codified at 40 C.F.R. §130.2(p)).

Around this same time, EPA proposed a replacement Watershed Rule.[8] In this replacement rule, EPA abandoned its 2000 definition of reasonable assurance, opting instead for the following:

> EPA is proposing ... to require that a jurisdiction submit as part of its TMDL supporting analysis and documentation a demonstration that the load allocation is "practicable" (i.e., that it can be accomplished using available and achievable methods).
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> In requiring jurisdictions to submit supporting analysis and documentation that the load allocations are practicable, EPA is intending that jurisdictions would show that they have considered whether the TMDL's load allocation to nonpoint sources are achievable based on currently available information regarding both the ***technical feasibility*** of the practice or management measures but also the ***likelihood that they would be implemented based on economic, social and cultural considerations***."[9]

This renewed focus on practicability (already a component of the existing TMDL rules) marked a dramatic change in EPA's approach to reasonable assurance, which was in part a reaction to the lawsuits over the 2000 rule and in part the result of significant additional outreach to the public between October and December 2001. (EPA hosted five listening sessions around the country during this period.)

The Watershed Rule reflects the latest official position taken by EPA on reasonable assurance; but, like the 2000 rule, the Watershed Rule never took effect.[10] As a result, Virginia does not have any guideposts from EPA by which to measure their nonpoint source reduction strategies.

EPA's reliance on the undefined "reasonable assurance" concept to reject Virginia's WIP is essentially the application of an unpromulgated rule. Imposition of the backstop consequences against Virginia for failure to provide "reasonable assurance" is an abuse of EPA's authority. Before EPA can compel states to provide reasonable assurance that their proposed nonpoint source reductions will be achieved, then EPA first must go through a notice-and-comment rulemaking process (as it has attempted twice before) to define how this standard may be met.

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[8] EPA released a deliberative draft of this rule on January 10, 2003.

[9] Watershed Rule at pp. 90-91 (emphasis added).

[10] In April 2005, EPA officially abandoned this rulemaking.

A TMDL is merely the sum of the load allocation and the wasteload allocation for a pollutant. The statute requires that the TMDL be set at a "***level***" necessary to meet water quality standards. A level is a number. Nothing in the statute gives EPA the authority to judge how that level is to be met. How a TMDL is to be met is an implementation issue, which is outside of EPA's authority.

V. Virginia's Implementation Plan Must Account for Cost, Achievability and Environmental Benefits.

Although EPA does not have legal authority under federal law to require an implementation plan, Virginia itself has enacted an implementation planning requirement. Va. Code § 62.1-44.19:4 *et seq.* This is a Virginia-specific law that EPA does not have the authority to enforce. Virginia's implementation planning statute requires an evaluation of the cost, achievability and environmental benefit of a given implementation plan. Va. Code § 62.10-44:19:7(A). EPA's proposed TMDL and related implementation actions do not account for these mandated considerations.

Moreover, EPA ignores its own statutory and regulatory provisions authorizing consideration of cost and achievability in determining the appropriate designated uses for a water body. EPA has acknowledged that "[o]ne way to achieve efficiency in the process of assigning attainable designated uses is to better synchronize UAA analyses with the TMDL process. In practice, UAAs may be conducted prior to, concurrently with, or after the development and implementation of a TMDL. In many cases, the data generated during a TMDL could well serve as the foundation for deciding whether a change in a use is warranted." EPA, Basic Information: Introduction to UAAs, http://water.epa.gov/scitech/swguidance/waterquality/stadnards/uses/uaa/info.cfm.

EPA's regulations provide that a change to a designated use may be appropriate where "controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact." 40 CFR § 131.10. For this reason, the National Research Council has recommended that states conduct use attainability analyses for a waterbody before a TMDL is developed. *See* Assessing the TMDL Approach to Water Quality Management, Committee to Assess the Scientific Basis of the Total Maximum Daily Load Approach to Water Pollution Reduction, National Research Council, 2001.

This is consistent with Virginia's statutory provisions, which provide a process for conducting a use attainability analysis (UAA) based on presentation of "reasonable grounds indicating that the attainment of the designated use for a water is not feasible." *See* Va. Code § 62.1-44.19:7.E. EPA's proposal fails to consider cost and achievability in its proposed TMDL, despite its own UAA regulations and Virginia's implementation planning statute.

The economic impacts of EPA's proposed TMDL are exorbitant for all Virginia stakeholders, but will have a profound impact on Virginia's agricultural community.

Agriculture has the benefit of estimating some expenses based on existing data on cost of implementing AgBMPs through current state and federal programs.

- Virginia estimates that just one practice (cattle fencing) could cost more than $800 million to implement. Fencing cattle from streams, putting in crossings, providing alternative watering, etc. costs on average $30,000 for a Virginia cattle farmer.
- Virginia's Natural Resources Commitment Fund says AgBMP cost-share funds will need to be $63.2 million annually from 2025 in order to get 60% NPS reduction goals from agriculture. This is only cost-share funding from Virginia. It doesn't account for federal government's traditional share of funding or the money that comes from farmers.
- Current funding estimates are based solely on the cost of installing the practice, they do not account for costs like loss of productive land, replacing practices when weather damages occur, fluctuations in markets, etc.
- Economic conditions (lack of profits, increased input costs, additional credit not an option) means that extra money to meet regulations is non-existent.
- Due to long-term devastating economic conditions for agriculture (like other sectors), federal backstops alone (mandatory permitting of small dairies, requiring some agricultural processing plants to do more) will be enough to drive some farmers out of business.
- Cost share funding will be critical to meeting the demands of EPA. Agriculture and forestry have seen depressed profits, just as the State and local governments have been facing historic deficits. Farmers, individual businesses and the State cannot meet this unfunded mandate from EPA without significant federal funding.

Given the current economic climate, Virginia's WIP, with its recognition of the need for trading and other alternative means of reducing nitrogen, phosphorus and sediment discharges, does an admirable job of balancing the costs and benefits of the TMDL and its implementation. Virginia's WIP has done so in compliance with the Virginia implementation planning statute. EPA's proposed TMDL does not adequately address these issues, but instead applies across-the-board reductions without regard to cost and achievability.

VI. EPA Has Not Provided Evidence of the Need for the Backstops Included in Its Proposed TMDL.

A. The Virginia WIP Was Designed to Achieve EPA's Mandated Allocations for Nitrogen, Phosphorus and Sediment.

The WIP developed by Virginia was designed to achieve the nutrient and sediment reductions established by EPA. Virginia WIP Overview at p. 6 (Key Questions and Answers); WIP pages 7 - 10. Virginia has every intention of achieving the reductions required by EPA. *Id.* The inputs that Virginia provided to EPA as part of the WIP development process were established to meet the reductions goals. Accordingly, there is no environmental basis for rejecting Virginia's WIP.

The fact that EPA, when running the model, found that there was a slight shortfall in the nitrogen and phosphorus reductions goals demonstrates the need for Virginia and EPA to confer and review the model data. EPA has acknowledged that the model will be "refined" in 2011 to address certain deficiencies. The question is whether these deficiencies are within the range of the EPA-projected shortfall. Either way, EPA is unjustified in using these model runs as a basis for rejecting Virginia's WIP and imposing draconian across-the-board reductions for all sectors in Virginia.

B. Bay Model is Flawed and Cannot be Used as the Sole Basis for Backstop Allocations.

EPA has acknowledged that the Bay modeling process needs to be refined, and that some refinements will take place as soon as 2011. *See, e.g.,* Letter from EPA Region III to the watershed states, July 1, 2010. EPA has also stated that any corresponding adjustments to the allocations resulting from the modeling refinements will be addressed in the 2011 round of state WIPs. *Id.*

Such refinements should take place before any implementation plan is finalized much less imposed. Following are some examples of the concerns about the accuracy of the Chesapeake Bay Model.

- In 2010, Virginia Cooperative Extension conducted a field observation study in the Coastal Plain. They found that 90% of crop acres were planted in no-till. Only 15% of the acres are enrolled in DCR's no-till program.
- Is the model fully accounting for practices that are already mandated by state permitting programs? (ex: mortality control for poultry facilities)
- The model is currently "throwing out" actual, ground-truthed data from Virginia because it does not meet the "modeled" land use data. This is unfair when the practices are meeting all requirements set forth by EPA.
- EPA models have not been fully validated or peer reviewed, and the records of what validation and peer review have occurred have not been made available to the public;
- EPA's models were calibrated using data from years with widely varying hydrologic conditions that are not representative of the conditions being projected through the TMDL;
- EPA has not explained, justified or documented the actual uncertainty/error/precision of the models;

- The model framework does not include all point sources. It is our understanding that at least 130 nonsignificant industrial or municipal dischargers were not included because they were not correctly located;
- The model fails to simulate the performance of nutrient management plans;
- It is unclear what delivery factors were used for the tributaries and for facilities within each tributary;
- Changes in the model have resulted in different outputs for chlorophyll-*a* that call into question both the assumptions in the model and the validity of the chlorophyll-*a* criteria itself;
- The groundwater inputs to the models are not representative of actual conditions;
- The impact of urban stormwater loads is highly sensitive to EPA's assumptions regarding urban land uses, which have not been validated or subjected to public review; and
- The models are so complex and highly parameterized that it is possible to obtain the "right" answer for the "wrong" reason.

EPA's TMDL must be based on accurate information. No regulations, penalties, allocations or implementation requirements should be imposed on Virginia or the agricultural community until the science and data have been fully vetted and demonstrated to be accurate.

C. EPA Has Not Provided Sufficient Evidence of the Environmental Benefits to be Achieved through Its Proposed Backstops.

EPA has not provided any evidence that the partial and full backstop scenarios in its TMDL are necessary to achieve an environmental benefit. Moreover, EPA's proposal overlooks significant programs included in Virginia's WIP that would result in significant water quality improvements.

For example, the following agricultural practices, included in Virginia's WIP, given proper implementation and funding, will result in significant water quality improvements. The development of Agricultural Resource Management or Conservation Plans to meet the individual conservation needs of each farm will result in progress without mandating a "one-size-fits-all approach." Likewise, the use of nutrient management plans encourages individualized management plans that are designed to reduce nutrient and sediment discharges.

Virginia's WIP proposes to build off of the incentive-based practices and programs that have already shown significant progress. EPA has not provided any evidence that it needs to intervene in this process and substitute its version of heavy-handed, government regulation.

VII. The Data and Information Relied Upon by EPA to Establish Its Draft TMDL Have Not Been Shared with the Public.

EPA claims to have relied on the "Scenario Builder" model to develop inputs or assumptions for the Chesapeake Bay Watershed Model, which then generates data used to determine whether water quality standards will be met based on those inputs. *See* Draft TMDL, Section 8 and Appendix H.

> Scenarios representing different nutrient and sediment loading conditions were run using the Chesapeake Bay Phase 6.3 Watershed Model [the Scenario Builder] and the resultant model scenario output was fed as input into the Chesapeake Bay Water Quality Model to evaluate the response of critical water quality parameters, specifically dissolved oxygen, water clarity, underwater bay grasses and chlorophyll *a*.

Draft TMDL, Appendix H at page 1. Despite the significance of this information, EPA did not make the Scenario Builder input decks and outputs for the partial backstop and full backstop scenarios and for EPA's evaluation of Virginia's WIP available until November 2, 2010 - over 4 weeks after the public comment period began. This gave stakeholders only 6 days to access and review the information. This is hardly enough time for stakeholders to meaningfully comment on such critical aspects of the modeling data.

In addition to shortchanging stakeholders, the expedited process established by EPA also does not allow sufficient time for the states to review and address comments received on the Bay TMDL as part of the WIP modification process. It is our understanding that the states will have only 4 days following the close of the public comment period on November 8 to develop revised input decks and request new model runs from the Chesapeake Bay Model. The states do not have enough time to process the comments received and incorporate them into their decisions about input decks and model runs for purposes of revising the WIP. The states will also have very limited time with which to evaluate the model run results and incorporate them into their revised WIP proposals. The accelerated pace established by EPA undermines EPA's claims that it values stakeholder input and desires a transparent and open TMDL development process. This is especially true given the fact that the consent decrees that EPA relies upon as the basis for the accelerated timetable don't require the Bay TMDL to be completed until May 2011. EPA itself has chosen to move the deadline up to December 2010.

The process that EPA has established for the development of the Bay TMDL runs afoul of the spirit of the Administrative Process Act. Access to the underlying modeling data should be provided with sufficient time for stakeholders to meaningfully participate in the development of such a complex TMDL that will have significant effects on the agricultural community, and all stakeholders throughout the watershed.

VIII. Conclusion

The VA Farm Bureau is committed to doing its part to ensure the restoration of the Chesapeake Bay. Virginia's September 3, 2010 WIP provides a sensible approach for achieving the nutrient and sediment reduction goals set by EPA. The TMDL proposed by EPA, however, lacks legal and technical support, and undermines the progress that has been made by the agricultural community through the regulatory and non-regulatory programs already established in Virginia. Building upon these programs will lead to greater reductions by the agricultural community. Additionally, allowing opportunities for trading and other incentive-based programs will ensure a continued partnership to achieve reductions.

Thank you again for the opportunity to provide these comments.

Sincerely,

Wayne F. Pryor
President

cc: Mr. Anthony Moore
Mr. David Paylor
Mr. David Johnson
Mr. Matt Conrad
Members, VA House Agriculture, Chesapeake and Natural Resources Committee
Members, Senate Agriculture, Conservation and Natural Resources Committee
Virginia Senate Delegation
Virginia House of Representatives Delegation